No. 80-29

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF ST. LOUIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly enjoined petitioners from using a particular employment test, which had a disparate racial impact, when petitioners had failed to establish the validity of the test at an evidentiary hearing.

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*Additional petitioners are: Frank C. Cummings, Acting Chairman of the Civil Service Commission of the City of St. Louis; Fred Gould, a member of the Civil Service Commission,

2. Whether the totality of the circumstances justified the order of the court of appeals which required that petitioners immediately promote eligible employees from firefighter to fire captain, at a rate reflecting the proportion of blacks in the firefighter rank, using the results of that portion of the employment test which, although not validated, was the most closely job-related criterion available.

City of St. Louis; Charles Marino, Director, Department of Public Safety, City of St. Louis; Denis D. Broderick, individually and in his capacity as Fire Chief of the City of St. Louis; R. Elliott Scearce, individually and in his capacity as Director of the Department of Personnel, City of St. Louis.

Additional respondents are: Firefighters Institute for Racial Equality, a corporation; George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, Eugene Stanton, Preston Sims, each individually and on behalf of all other persons similarly situated; Joseph Blessing, Michael Davis, Robert Crowley, David Banta, Andrew Rios, George Hohmann, Don Blackwell, Nick Altmeyer and George Tschlis, each individually and as members of a class; Roland Ralston and William O. Hill.

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OPINIONS BELOW

The opinion of the court of appeals, as modified on denial of the petitions for rehearing (Pet. App. A-1 to A-29), is reported at 616 F.2d 350. The opinion of the district court (Pet. App. A-30 to A-39) is reported at 470 F. Supp. 1281.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1980. On April 9, 1980, the petitions for rehearing were denied and a modified opinion was entered. The petition for a writ of certiorari was filed on July 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38309 (1978), 28 C.F.R. 50.14 *et seq.*, 29 C.F.R. 1607, and the Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996 (1979), are reproduced at Pet. App. A-82 to A-189.

STATEMENT

This is the third petition for certiorari to be filed in this protracted litigation. The two earlier petitions were denied. See *Banta* v. *FIRE*, 443 U.S. 904 (1979), *Banta* v. *United States*, 434 U.S. 819 (1977).

1. The United States brought this action against petitioners, the City of St. Louis and several municipal officials, on March 18, 1974, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The United States alleged that petitioners had engaged in a continuing pattern and practice of racial discrimination in employment with respect to the administration of the St. Louis Fire Department. The government's suit was consolidated with an action that had previously been brought by the Firefighters Institute for Racial Equality ("FIRE") and several individual black firefighters and job applicants.

The consolidated cases were tried in May 1975, and a final judgment was entered on June 28, 1976. *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).[1] The court found, in accordance with the terms of a partial consent decree, that petitioners' examination for entry level firefighter positions had a disparate impact on black applicants and had not been validated. The court enjoined further use of that test and ordered petitioners to hire blacks to fill 50% of all entry level positions for five years (418 F. Supp. at 384). This goal was imposed "to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City * * *" (*ibid.*). In all other respects, including the government's challenge to petitioners' promotion

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[1] A group of white firefighters and job applicants intervened in both cases. The court's judgment of June 28, 1976 supplemented an earlier judgment that the court had entered on April 9, 1976. See *United States* v. *City of St. Louis*, 410 F. Supp. 948 (E.D. Mo. 1976).

practices, the court entered judgment for petitioners. The United States and FIRE appealed.

The court of appeals reversed the judgment of the district court on the question of discrimination in promotions from firefighter to fire captain. *FIRE* v. *City of St. Louis*, 549 F.2d 506 (8th Cir. 1977) (Pet. App. A–55 to A–73). The court of appeals held that the 1974 fire captain test had a disparate racial impact on blacks and had not been properly validated (*id.* at A–57 to A–68).[2] A petition for certiorari was denied (*Banta* v. *United States*, 434 U.S. 819 (1977)).

The district court entered two orders on remand. In its first order, which was entered on October 21, 1977, the court enjoined petitioners from engaging in any racially discriminatory practices with respect to fire captain promotions and further ordered petitioners to develop and validate a new fire captain test (Pet. App. A–42 to A–43). In the interim, the court enjoined petitioners from making temporary or permanent appointments based on the 1974 fire captain test results, except that petitioners were allowed to promote persons who had passed the test, subject to the condition that 50% of the appointees would be black (*ibid.*). In fact, petitioners made no promotions in accordance with this procedure (*id.* at A–48 to A–49). Petitioners did not appeal the district court's order of October 21, 1977.

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[2]The court of appeals also reversed the district court's judgment concerning the Fire Department's segregated eating arrangements (Pet. App. A–68 to A–70), and it affirmed the lower court's finding that the examination for promotion from captain to battalion chief had no discriminatory impact (*id.* at A–70 to A–73).

On January 26, 1978, the district court vacated the October 21 order and prescribed a new procedure for interim promotions (Pet. App. A-74 to A-79). Under the revised procedure all firefighters who had served at least five years would be considered for promotion in order of seniority (*id.* at A-76). When a vacancy occurred, an assessment center technique[3] was to be used to evaluate the most senior white firefighter and the most senior black firefighter, with the promotion then being awarded to the person with the higher evaluation (*ibid.*). The unsuccessful candidate would continue to be eligible for promotion and would be evaluated for the next vacancy, together with the next most senior white and the next most senior black (*ibid.*). Unsuccessful candidates would continue to be evaluated along with two new candidates each time a vacancy occurred (*id.* at A-77).

FIRE appealed from the January 26 order, and the court of appeals reversed. *FIRE* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978) (Pet. App. A-40 to A-54). The court held that petitioners' failure to promote 12 blacks who had passed the 1974 test, as permitted by the district court's order of October 21, was "the continuation of a policy of discrimination against those black candidates for promotion who have been the victims of discrimination in the past" (*id.* at A-49). The court of appeals remanded the case with instructions that petitioners be required to promote the 12 black

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[3]The assessment center technique is "a selection procedure which uses individual and group exercises to simulate job responsibilities while assessors evaluate a candidate's performance" (Pet. App. A-44 n.4).

candidates who had passed the 1974 test, and that they also be allowed to promote 12 whites (*id.* at A-51 to A-52). To the extent practicable, half of all temporary captain positions were to be filled by blacks (*ibid.*). The court of appeals also ordered petitioners to develop and validate a new fire captain test by January 1, 1979 (*id.* at A-52). On December 19, 1978, the district court entered an order in accordance with the mandate (*id.* at A-80 to A-81).[4]

2. On December 29, 1978, petitioners submitted a validation report for a new fire captain test (Pet. App. A-4). The parties agreed that the test should first be administered to determine whether it had a disparate racial impact before litigating the issue of validity (*id.* at A-5).

The new test consisted of two parts, a 130-question written multiple choice exam, accounting for 30% of the maximum possible score, and a three-part assessment center evaluation, accounting for 70% of the score (Pet. App. A-4). The two parts of the test were administered on February 27 and April 9, 1979 (*id.* at A-5), and candidates were then ranked according to their combined scores (*id.* at A-14).

Without prior notice to the government or to FIRE, petitioners announced the results of the combined test, certified an eligibility list and commenced the promotion process on April 26, 1979 (Pet. App. A-5). After learning that petitioners had certified the eligibility list, government counsel contacted petitioners' attor-

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[4]The intervenors petitioned for certiorari, which was again denied. *Banta* v. *FIRE*, 443 U.S. 904 (1979).

neys and scheduled a meeting for the afternoon of April 30, based upon the assurances of petitioners' attorneys that promotions would not be made for at least a week (*id.* at A-6). On the morning of April 30, however, 16 white firefighters from the certified list were sworn in as fire captains (*ibid.*). Eight more promotions, including one black, were scheduled for the afternoon of April 30, and 24 promotions were scheduled for May 2 (*ibid.*). The government subsequently agreed to allow the April 30 promotions to go forward, subject to petitioners' agreement to refrain from further promotions (*ibid.*). The court thereafter entered a temporary restraining order preventing further promotions (*ibid.*).

The court subsequently heard extensive evidence concerning the validity of petitioners' test at a preliminary injunction hearing (Pet. App. A-25).[5] On June 4, 1979, the district court denied preliminary injunctive relief (*id.* at A-30). The district court found

[5] Petitioners attempted to establish the job-relatedness of the promotion test by means of a content validation study (Pet. App. A-12). Content validation is one of three recognized procedures for validating employment tests (*Washington* v. *Davis*, 426 U.S. 229, 247 n.13 (1976)), and is "[d]emonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job" (Uniform Guidelines on Employee Selection Procedures, Section 16D; Pet. App. A-144). The construction of a content valid test first requires a job analysis in which "important work behavior(s) required for successful performance and their relative importance" are identified and analyzed (Uniform Guidelines, Section 14C(2); Pet. App. A-132). The parties here agreed that an adequate job analysis had been completed for the fire captain test (Pet. App. A-13 n.13). The question at issue is whether the test was satisfactory in testing those job behaviors that the job analysis had identified.

that the government has established a prima facie case of racially disparate impact (*id.* at A-34),[6] but that petitioners had succeeded in validating the test (*id.* at A-39).

The government and FIRE appealed from the district court's order and the court of appeals again reversed (Pet. App. A-1 to A-29). While the court of appeals agreed that petitioners' test had a disparate impact on blacks, it held that the district court had erred in concluding that petitioners had validated the test (*id.* at A-10).

Because of the substantial dissimilarity between the multiple choice testing procedure and the actual work situation, the court of appeals concluded that greater evidence of validity was required than would be the case where a test closely mirrored actual job behavior (Pet. App. A-12 to A-19). The court noted the substantial possibility for error inherent in attempting to develop a written multiple choice exam to measure the complex behaviors, interpersonal skills and abilities to make decisions under pressure—the job skills required of fire captains—particularly where the exam is to be used as a ranking device for candidates (*id.* at A-17). The court concluded that "[n]othing in the record can be construed as empirical evidence of an association

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[6] If petitioners had been allowed to make promotions based on the test, whites would have been appointed to fill 58 of 62 vacancies. Thus, 16.7% of the 348 whites completing the test would have been promoted compared with four of the 56 blacks (7.1%) completing the test. The black selection rate would have been 42.5% that of whites, far below the 80% rule of thumb that the Uniform Guidelines (see note 7, *infra*) suggest for measuring disparate impact (Pet. App. A-10 to A-11).

between levels of performance on the multiple choice examination and on the job" (*id.* at A–15).[7]

While the court of appeals found that some portions of the assessment center part of the test complied more closely with the spirit of the Guidelines than did the multiple choice exam, it also noted significant deficiencies in the assessment center part (Pet. App. A–19 to A–23). The court of appeals concluded that even the best sections of the assessment center portion of the test "do not stand alone * * * [but] are a part of an overall selection procedure which we hold to be inconsistent with the Guidelines" (*id.* at A–23). Because of the deficiencies found in both parts of the exam, the court of appeals held that the district court erred in its assessment of plaintiffs' likelihood of success on the merits (*ibid.*).

The court of appeals then turned to the "very difficult" question of relief (Pet. App. A–24). Immediate relief was necessary, the court found, to ameliorate the effects of the 24 promotions that petitioners had made under the unvalidated test in April 1979, par-

[7] In articulating the validation standards required, and assessing whether petitioners had met them, the court of appeals relied on various provisions of the Uniform Guidelines on Employee Selection Procedures (Pet. App. A–86 to A–148) and the Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (*id.* at A–149 to A–189). Both the Guidelines and the Questions and Answers were promulgated jointly by the Civil Service Commission, the Department of Justice, the Equal Employment Opportunity Commission and the Department of Labor. The district court reached its conclusions on the test's validity without reference to the standards and procedures set forth in the Guidelines.

ticularly because of the Fire Department's history of racial discrimination and the continuing harm that was being caused to the careers of black firefighters (*id.* at A–23 to A–25). Recognizing that there was "no ideal solution" (*id.* at A–24), the court of appeals noted that the assessment center portion of the test came "the closest to comporting with the Guidelines and would, thus, be the fairest basis for the selection of the eight black firefighters" (*id.* at A–25). Consequently, the court of appeals ordered immediate promotion of those eight blacks who had scored highest on the assessment center portion of the test (*ibid.*).

Given the extensive—and ostensibly complete—evidence that the parties had presented in the district court concerning the validity of the test, the court of appeals held that its conclusions as to the validity of the test would be dispositive unless petitioners could present further noncumulative evidence on remand (Pet. App. A–25). For that reason, together with petitioners' immediate need for additional fire captains and the already protracted course that the litigation had taken, the court deemed it appropriate to grant further relief. The court ordered petitioners to fill then-existing vacancies, as well as the next 30 vacancies, on a 2:1 white to black ratio, the order of appointment to be based on the candidates' scores on the assessment center part of the test (*id.* at A–27 to A–28).

While reluctant to order appointments based on the unvalidated assessment center portion of the test, the court of appeals found it necessary to do so for several reasons: (1) the pressing need to restore the rank of

fire captain to full strength;[8] (2) the further disadvantage that black candidates for promotion to captain positions would inevitably suffer because of the requirement that fire captains serve five years in that rank before becoming eligible for promotion to battalion chief; (3) the existence of a pool of eligible candidates available for immediate promotion;[9] (4) petitioners' recalcitrance in resolving the problems; and (5) the probability that petitioners would develop a new test before more than 30 additional vacancies occurred (Pet. App. A–26 to A–27).[10]

ARGUMENT

1. The court of appeals properly enjoined further use of the 1979 fire captain test because it had been shown to have a disparate impact on blacks and was not properly validated.

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[8] Because of a change in the retirement system, the number of vacancies in the fire captain rank has been so great that 38 vacancies remained after the 24 promotions were made in April 1979. It is anticipated that a total of 120 vacancies (three-quarters of all captain positions) will have been filled during the two-year life of the eligibility list (Pet. App. A–27). By contrast, only 18 vacancies had originally been anticipated for the two-year life of the 1974 fire captain eligibility list (*id.* at A–57).

[9] All those who took the assessment center portion of the exam had completed five years in service as firefighters, received satisfactory efficiency ratings, and passed the multiple choice portion of the exam.

[10] If all 30 promotions are made as directed, blacks will hold 26% of the fire captain positions within the department (Pet. App. A–27 n.25). Presently, blacks hold 27% of the entry-level positions in the department (*id.* at A–25 n.22). Blacks account for 15% of those who took the 1979 test (*id.* at A–34).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that an employment test having a racially disparate impact violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, unless the employer can show that the test effectively selects those candidates who are most likely to perform well on the job.[11] The court of appeals properly applied this standard. Petitioners were unable to prevail in the court of appeals only because they were unable to show that the fire-captain test was job-related.[12]

Firefighters who took the fire captain test were ranked according to their test scores, and they were eligible for promotion in rank order (Pet. App. A–14). However, the court of appeals found no persuasive evidence that a candidate's test performance was a reliable indicator of his future job performance (*id.* at A–15). The court of appeals noted a number of specific deficiencies in the multiple choice portion of the test: (1) only 53 of the 130 questions were identified by the test developers as performance-differentiating (*id.* at A–18); (2) differentiations among candidates were based on answers to a relatively small number of questions in that 90% of the candidates correctly answered 30% of the questions, while 80% of the candidates correctly answered 50% of the questions (*ibid.*); (3) there

[11] This Court has also recognized that the Guidelines for Employee Selection Procedures are entitled to substantial deference. See *Griggs*, *supra*, 401 U.S. at 433–434; *Albemarle Paper Co.*, *supra*, 422 U.S. at 431.

[12] Petitioners do not contend that the courts below erred in holding the test has a racially disparate impact.

was no proof that the more difficult items correlated either in number or in degree of difficulty with the knowledge and skills thought to be performance-differentiating (*ibid.*); (4) 20 items were designed to test for the "'ability to size up a fire,'" an ability that can be tested only by methods closely approximating actual job conditions (*ibid.*); (5) several questions tested knowledge that was unnecessary for performance of the job (*id.* at A–19); (6) some questions were phrased in terms not commonly used by firefighters, while other questions were poorly drafted and difficult to understand (*ibid.*); and (7) the multiple choice exam as a whole was very dissimilar to the physical and stressful job of firefighter (*id.* at A–12). With respect to the assessment center part of the test, the court of appeals found that certain parts were very dissimilar to the actual work situation (*id.* at A–21 n.19).

Finally, the court of appeals concluded (Pet. App. A–23) that the fire captain test as a whole was inconsistent with the Uniform Guidelines[13] which, as petitioners acknowledge, "provide the general standard of validity" (Pet. 22).[14] Having failed to establish

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[13]The court referred to several provisions of the Uniform Guidelines, including Section 14C(9), which provides that a selection procedure used for ranking candidates, as here, "should measure those aspects of performance which differentiate among levels of job performance" (Pet. App. A–14 n.14). The court also referred to Section 14C(4), which provides that as "the setting and manner of the administration of the selection procedure less resemble the work situation, * * * the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity" (*id.* at A–13 n.11).

[14]Whatever merit it might have in another context, petitioners' contention that the court of appeals improperly relied on the Questions and Answers is irrelevant here, where the court

the job-relatedness of the fire captain test through proper validation, petitioners were thus properly enjoined from further use of the test.[15]

2. In cases of racial discrimination, this Court has recognized that the federal courts must grant relief that will eliminate the lingering effects of past discrimination, to the extent that it is possible to do so, as well as prevent future discrimination. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418. Given that principle and the posture of this case, on appeal for the third time after years of litigation that had

found serious deviations from the standards and procedures required by the Uniform Guidelines. At all events, administrative interpretations of agency regulations are entitled to deference. *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 433–434.

[15] Because both courts below treated as final the decision on the validity of the test (in the absence of additional evidence that petitioners might present on remand), the standards for issuing a preliminary injunction are not involved here. Petitioners seem to suggest (Pet. 13, 15, 16, 27, 28) that it was somehow improper for the court of appeals to have rendered a final decision on the merits. It is well established, however, that the courts of appeals have that authority even in an interlocutory appeal. *Jackson County, Mo.* v. *Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978); *Yamamoto* v. *Omiya*, 564 F.2d 1319, 1325 n.11 (9th Cir. 1977). It is particularly appropriate for a court of appeals to reach the merits where, as here, the litigation has been protracted, the district court has reached the merits, and the issues have been clearly defined and fully litigated. *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). Indeed, petitioners do not contend that they had any evidence of validity that they were prevented from presenting. Nor do they assert that the court of appeals was incorrect in concluding that the district court had also treated the matter as a final decision with respect to the test's validity. At all events, petitioners have not been prejudiced in any way. The court of appeals expressly provided that petitioners should have the opportunity to reopen the question of test validity if they have further evidence to present on remand (Pet. App. A–25).

failed to resolve the problem of promotion discrimination within the St. Louis Fire Department, it is clear that the court of appeals did not abuse its discretion by ordering the interim and long term relief that it did. Nor did the decision of the court of appeals conflict with any decisions of this or any other court.

Petitioners do not contest the theoretical propriety of providing for numerically-based interim relief in Title VII cases (Pet. 9), and they recognize that federal courts have regularly fashioned such relief (*ibid.*). See, *e.g.*, *United States* v. *City of Miami, Fla.*, 614 F.2d 1322 (5th Cir. 1980), petition for rehearing granted (Aug. 26, 1980).[16] Instead, petitioners urge that this Court review the "almost bewildering variety of ratios and rationales" (Pet. 9) that the courts have employed in fashioning relief in Title VII cases. It is both necessary and proper, however, that remedial decrees should differ from case to case because it is the essence of equity jurisdiction that a remedy must be fashioned to fit the facts once a violation of the law has been established. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The federal courts have long recognized both the "highly individualistic nature" of remedial decrees (*Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 643 (4th Cir. 1978)), and

[16] Indeed, it may be an abuse of discretion not to award affirmative relief in the face of a finding of racial discrimination in employment. *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974)); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972). At all events, as the Chief Justice has recently said, "Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 31.

the need for flexibility in formulating relief in complex racial discrimination cases where emotions run high (*Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371, 374 (3d Cir. 1974)). A scientific basis for choosing a particular mode of relief need not be demonstrated (*Vulcan Society of N.Y. City Fire Dep't, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 398–399 (2d Cir. 1973)), and various mechanisms for affording relief may be appropriate in a particular case (*Morrow* v. *Crisler*, *supra*, 491 F.2d at 1056; *Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972)).

Despite the inherent logic and vast authority supporting flexible relief formulas,[17] petitioners contend that this case warrants review because the court of appeals erred in choosing the specific numbers that it chose (Pet. 13). If all promotions are made pursuant to the court of appeals' decision, 26% of petitioners' fire captains will be black (Pet. App. A–27 n.25), while 27% of the firefighters rank is presently black (*id.* at A–25 n.22). Petitioners contend that the court of appeals erred in selecting a percentage greater than 15%, which is the percentage that reflects the black contingent among those firefighters who took the 1979 examination (Pet. 13). Petitioners assert that the percentage adopted by the court of appeals demonstrates "a significant departure from the norms of affirmative relief under Title VII" (*id.* at 14). That contention also lacks merit.

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[17] In fact, the government suggested a formula that was different from that which the court of appeals adopted (Pet. App. A–8 to A–9).

The interim relief ordered by the court of appeals must be viewed in light of the fact that this case was then before that court for the third time. On the first appeal, the court had directed petitioners to develop and validate a new test for fire captains. On the second appeal, the court noted petitioners' failure to develop that test, as well as petitioners' intransigence in refusing to take any appropriate interim steps to end discrimination. At that juncture, the court ordered certain minimal interim relief and again required the development of a new test. On the third appeal, the court found that petitioners had still failed to produce a validated test. In these circumstances, the court of appeals did not abuse its discretion in declining to afford petitioners yet another extension of time in which to begin providing black firefighters with the rights guaranteed by Title VII.[18]

The court of appeals' decree must also be viewed in light of petitioners' historic practice of entry level racial discrimination and of recent changes in the retirement system, whereby approximately three-fourths of all fire captains will have to be selected in the immediate future (Pet. App. A–26). Given the large number of vacancies that presently exist, together with those that will open up in the near future, it is obvious that few vacancies can be expected to occur beyond the short run. Moreover, while the rank of firefighters is now 27% black (*id.* at A–25 n.22)—due

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[18] Indeed, the Fifth Circuit recently cited the history of this litigation as an example of "the delay in ending discrimination that can be caused by protracted litigation" (*United States* v. *City of Miami, Fla., supra*, 614 F.2d at 1334 n.23).

to the relief required by the 1976 finding of entry level discrimination[19]—the requirement that persons serve five years as firefighters before taking the captain test (Pet. App. A–27)[20] resulted in the fact that only 15% of those taking the 1979 test were black (Pet. 13). Given the unprecedented number of vacancies in the rank of captain, the court of appeals could not ignore petitioners' historic practice of entry level discrimination if its decree were to succeed in overcoming the effects of past discrimination in the foreseeable future. *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 697 (6th Cir. 1979), petition for cert. pending, No. 79–1080 (filed Jan. 10, 1980). See also *Patterson* v. *Newspaper and Mail Deliverers Union*, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).[21]

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[19] Even the 27% figure probably underrepresents blacks because petitioners have not yet reached the end of the five year period during which the hiring goal was to apply. *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).

[20] In 1976, blacks accounted for only 11% of the Department's total uniformed force. *United States* v. *City of St. Louis*, 410 F. Supp. 948, 951 (E.D. Mo. 1976). In 1979, blacks accounted for 22% (Pet. App. A–25 n.22).

[21] Petitioners also contend that the court erred in requiring that promotions be based on scores derived from the assessment center portion of the test while finding that the test as a whole had not been validated. The court of appeals admitted that its solution was not ideal, but it declined to sanction further delays in affording a remedy to those who had suffered discrimination here. Consequently, the court chose—as other courts have done—to require petitioners to use the most nearly job-related means available to make interim selections. See *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971); *Oburn* v. *Shapp*, 521 F.2d 142, 152 (3d Cir. 1975); *NAACP* v. *Allen*, 493 F.2d 614, 617–618 (5th Cir. 1974). The court of appeals limited the candidates eligible for promotion to persons who met petitioners' basic qualifications in terms of experience and job performance

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and who had passed the multiple choice portion of the challenged test (Pet. App. A–27). Moreover, the order in which appointments were to be made is based on performance on the portion of the test that the court found to be most closely job-related. Accordingly, the court of appeals' decision represents a well-reasoned effort to tailor relief to petitioners' undisputed need for immediate appointments of qualified personnel, tempered by the need to secure the equal opportunity rights guaranteed to the black firefighters by Title VII.

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